88-1641 (1)

Supreme Court, U.S.
FILED
MAR 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

DONALD BODINE, Petitioner,

v

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Donald Bodine
Pro Se
100 Washington Street, Apt., 3G
Hempstead, New York 11550
(516) 483-3346

MARCH 1989

55 pp

QUESTIONS PRESENTED

1. Whether the Congress has vested judicial power in the Merit Systems Protection Board (MSPB) under Article III, Section I, to the United States Constitution.

2. Whether the Federal Court's Improvement Act of 1982 usurps the Judiciary Act of 1789, (now evolved into Title 28 of the United States Code) which is composed of the normal three-tiered judicial review system.

3. Whether the criminal process begins as soon as one is accused of violating a federal criminal statute.

4. Whether the United States Claims Court is an Article I, court.

5. Whether a trial by jury can be waived without the consent of the accused.

6. Whether decisions made in excess of statutory power are null and void.

7. Whether the right to follow a chosen profession comes within the liberty and property concept of the Fifth Amendment.

8. Whether the employing agency can

charge an employee injured in the course of employment with being A.W.O.L. during the 45-day entitlement period under the Federal Employees' Compensation Act 5 U.S.C. 8118; 20 C.F.R. 10.209(c).

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UNITED STATES OF AMERICA
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ON WRIT OF CERTIORARI TO THE
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PETITION FOR WRIT OF CERTIORARI

Petitioner, Donald Bodine, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered December 19, 1988.

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (App. A-1) has not been prepared for publication. Such opinion of the United States Claims Court

reported at, 14 Cl. Ct. 661 (1988 (App. B.)

JURISDICTION

The opinion of the United States Court of Appeals for the Federal Circuit, entered on December 19, 1988, timely motion for rehearing was filed, and denied on January 25, 1989. (App. C.). This Court has jurisdiction under 28 U.S.C.A. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

2. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury *** nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law *** .

3. The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed *** .

4. Article III, Section 1, of the United States Constitution provides in relevant part:

> The judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish *** .

5. Article III, Section 2, Clause 3, of the United States Constitution provides in relevant part:

> The judicial Power shall extend to all cases, in law and Equity, arising under this Constitution, the Law of the United States, and Treaties made, or which shall be made, under their authority *** .

6. Article III, Section 3, of the United States Constitution provides in relevant part:

> The Trial of all crimes, except in Cases of Impeachment, shall be by jury *** .

7. The Federal Employees' Compensation Act, as amended by Pub.L. No. 93-416, 88 Stat. 1145, Section 8118(a) provides:

> The United States shall authorize the continuation of pay of an employee, as defined in section 8101(1) of this title (other than those referred to in clause (B) or (E), who has filed a claim for a

period of wage loss due to a traumatic injury with his immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a((2) of this title.

8. The Federal Employees' Compensation Act, as amended by Pub.L. No. 93-416, 88 Stat. 1145, Section 8118(b) provides:

> Continuation of pay under this subchapter shall be furnished-
> (1) without a break in time unless controverted under regulations of the Secretary;
> (2) for a period not to exceed 45 days; and,
> (3) under accounting procedures and such other regulations as the Secretary may require.

9. The Federal Employees' Compensation Act, as amended by Pub. L. No. 93-416, 88 Stat. 1145, Section 8118(c) provides:

> An employee may use annual or sick leave to his credit at the time the disability begins, but his compensation for disability does not begin, and the time periods specified by section 8117 of this title do not begin to run, until termination of pay as set forth in subsections (a) and (b) or the use of annual or sick leave ends.

10. The Federal Employees' Compensation Act, as amended by Pub.L. No. 93-415, 88 Stat. 1145, Section 8118(d) provides:

> If a claim under subsection (a) is

denied by the Secretary, payments under this section shall, at the option of the employee, be charged to sick or annual leave or shall be deemed overpayments of pay within the meaning of section 5584 of title 5, United States Code.

11. Title 20, Code of Federal Regulations, Section 10.209(c) provides:

> A "Duty Status Report," Form CA-17 will be used to obtain interim medical reports concerning the employee's duty status. If during the 45 day period the treating physician indicates the employee is able to return to work and the employee refuses to do so, the continued absence from work may result in an overpayment. The period of absence from the job which resulted in the overpayment will be determined by the Office in the course of adjudication of the claim. The official superior and the employee will be notified of the period of disability which is approved by the Office and the official superior may then require the employee to resolve any overpayment.

12. Section 1491(a)(2) of the Tucker Act, as amended by Pub.L. 92-415, 86 Stat. 652, provides in relevant part:

> To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to

remand appropriate matters to any administrative or executive body of official with such direction as it may deem proper and just ***.

STATEMENT OF THE CASE

This is a civil pay case supported both by the Tucker Act's jurisdiction of claims founded upon an Act of Congress and the jurisdiction of claims founded upon a regulation of an executive department. 28 U.S.C. 1491(a)(1).

A substantial change in relief which may be granted by the Claims Court in civil pay cases was brought about by the Act of August 29, 1972, 86 Stat. 652, Pub.L. 92-415, see (App. D.)

The petitioner sustained a traumatic injury in the course of employment on July 15, 1981. Filed a claim on CA-1 (Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay/Compensation). The employing agency retained such form in violation of (20 C.F.R. 10.207(5), charged the petitioner with being A.W.O.L., during the 45-day entitlement period under 5 U.S.C. 8118 (b) knowing that the petitioner had never

returned to work since the injury, however, when PATCO went on strike, the employing agency charged the petition with being A.W.O.L., fired the petitioner on August 25, 1981, during those mass firings, then, as the case record clearly shows, they filed the petitioner's claim with the Department of Labor after the petitioner was no longer an employee. The Department of Labor issued its adjudication on September 30, 1981, approving the petitioners claim, and affirming the petitioners status as an "employee" as set forth under 5 U.S.C. 8101(1). Thus the petitioner is entitled to all rights and benefits guaranteed by that Act.

The hearing held before the Merit Systems Protection Board (MSPB) was merely a "fishing trip", and the discovery process used clearly shows that all employees covered by the 45-day entitlement period under the FECA were exempt from those mass firings. This special malice taken against the petitioner without cause has prevented the petitioner form pursuing his chosen profession. More-

over, the transcript, which is the official record of this case, clearly shows that such testimony by government officials, ex., on page 217, the F.A.A. official unequivocally admits not adhearing to the regulations promulgated by the Secretary of Labor under 20 C.F.R. 10.200 et seq., however, one will never know all this took place if the official record is not reviewed. All evidence presented before the MSPB, because of its predetermined decisions was ignored.

Since the petitioner had a right of action against these agency officials for their ultra vires acts and special malice , the petitioner had to delay any judicial action until the action before the MSPB was completed, mindful of the well settled rule that only rarely and in exceptional circumstances is a litigant justified in going into court before a final administrative review has been completed.

The MSPB delayed its decision until after October 1, 1982, whether intentionally or due to the heavy volume of cases before it

nevertheless, the MSPB delayed its decision until after the newly created United States Court of Appeals for the Federal Circuit began entertaining appeals from them on October 1, 1982, due to the enactment of the Federal Court's Improvement Act Of 1982 (96 Stat. 25, Pub.L. 97-164), and that sudden change in the normal three-tiered judicial review system.

Prior to the Act, an employee seeking judicial review of an allegedly improper or capricious adverse action must first resort to the Federal District Court rather than the appellate route simply because there was no statute conferring jurisdiction on the court of appeals to hear such cases directly.

This sudden change in our normal three-tiered judicial review system, whereby evading the trial courts (district courts) which have federal question jurisdiction under 28 U.S.C. 1331. This by-pass of the district courts has allowed administrative agencies with unwritten power which has allowed them to decide one's innocence or guilt for the

alleged violation of 18 U.S.C. 1918, an offence which can be tried only upon indictment.

Surely no part of the judicial power of the country was conferred on the MSPB; because the Constitution expressly vests it "in one supreme court and such inferior courts as the Congress may from time to time ordain and establish.

The importance of the main question presented in this petition cannot be overstated, for it involves the very framework of our system and the fundmental principles of American Liberty.

The legislative history (especially Senate Report No. 97-275 U.S.Code Cong. and Administrative News Peport (April 1982), makes it clear that the Federal Court's Improvement Act was intended "To resolve some of the myraid administrative and procedural problems that have impaired the ability of our Federal Courts." The Federal Court's Improvement Act was designed to enhence

citizen access to justice. Not circumvent the Constitutional guarantees. See (Senate Report, p 1).

The United States Claims Court was established under Article I, of the Constitution, Congress has expressly granted jurisdiction to them over this type of case, and no other federal court is vested with such jurisdiction.

The petitioner had surely exhausted all available administrative remedies under the administrative process, this civil pay case was filed in the Claims Court under the power in 28 U.S.C. 1491, as amended by the Act of August 29, 1972. (App. D. 1 - 9). The defendant filed a motion to dismiss for lack of jurisdiction, after the petitioner filed a summary judgment. The dilatory tactics employed by the defendant, which has announced in open court their failure to prosecute. See, United States v. Amato, 534 F Supp. 1190 (1982) at p. 1193-94 it states; "the Department admitted the obvious imprac-

ticbility and difficulties in attempting to prosecute all of the controllers who it believed had engaged in the strike".

This is the same defendant which has cried that the Claims Court lacks jurisdiction to entertain the petitioners claim, which has brought about this "error in exercise of jurisdiction" this error was compounded when the Claims Court in its opinion, 14 Cl. Ct. 661 (1988) at p. 662, they state; "Plaintiff did not appeal the MSPB's decision to the Court of Appeals for the Federal Circuit". Thus, another error. Reading further on in the same opinion of the Claims Court, in the portion marked, CONCLUSION, they state; "For the foregoing reasons defendant's motion is granted and the Clerk of the Court shall dismiss the complaint. No purpose would be served by transferring plaintiff's complaint to the Federal Circuit, since the 30-day statute of limitations within which an appeal of a MSPB decision must be filed expired

long before the instant suit was filed. See 5 U.S.C. 7703(b)(1)".

Surely the Claims Court knows that its remand powers only exist in cases within its jurisdiction. Thus, since they admit, no purpose would be served by transferring the petitioner complaint back to the Federal Circuit, jurisdiction must exist. However, because of the Federal Circuit's intermediate appellate jurisdiction under 28 U.S.C. 1295 (a)(3), the opinion of the Claims Court was appealed, once again sending this case back before the Federal Circuit which knows that the Claims Court has made an error.

Rule 47.2(b) of the Court of Appeals for the Federal Circuit reads as follows:

> Assignment of cases to panel will be made so as to provide each judge with a representative cross section of the fields of law within the exclusive jurisdiction of the court. A subsequent appeal or petition in a case will to the extent possible be assigned to the panel that decided the earlier appeal (s) or petition (s).

Thus, two of the judges on the earlier panel, that decided the case that the Claims Court denies was appealed to the Federal Cir-

cuit, Bodine v. Department of Trans., F.A.A. Appeal No. 85-1004, slip opinion (Fed. Cir. July 12, 1985) (unpublished),, affirmed the opinion of the Claims Court. Such a rule in the Federal Circuit allowing the same judges to entertain a subsequent appeal closes the door to "recusation", and makes the provisions under 28 U.S.C. 455 meaningless.

The legislative history (Senate Report No. 92-1006, U.S.Code Cong. and Administrative News Report (April 1972) (App. D.) clearly indicates that the purpose of H. R. 12392 is to allow persons having monetary claims falling within the jurisdiction of the Court of Claims (now Claims Court) to obtain all necessary relief in one action. This appears to conflict with 28 U.S.C. 1295 (a)(3), which allows the Court of Appeals for the Federal Circuit to have appellate jurisdiction over final decisions of the Claims Court. As the Senate Judiciary Committee explained the "primary class of cases

where a broader remedy is needed are suits filed on a money claim by a goverment employee who alleges that he was illegally discharged.

The criminal process starts as soon as one has been accused of crime. There is absolutely no evidence in the case record to uphold the petitioners convection of striking against the Government of the United States in violation of 18 U.S.C. 1918, especially when the employer admitted at the administrative hearing that their evidence was circumstantial, based upon the fact that the petitioner was not on duty during the time of the PATCO strike. Surely they knew that the petitioner had not returned to work since the date of the injury which was July 15, 1981. When the PATCO strike occurred on August 3, 1981, the employing agency admitted at the administrative hearing that the petitioners claim for the traumatic injury had not yet been filed by them. It must be borne in mind that the petitioner gave the FORM CA-1 to his superior as the records

clearly indicates. They intentionally withheld that form from the United States Department of Labor until after they fired the petitioner on August 25, 1981, and its all in the case record.

In, Bodine v. U.S., 14 Cl Ct 661, at p. 661, it clearly states:

> On July 15, 1981, plaintiff sustained an injury to his left shoulder while performing his duties as an air traffic controller. He never returned to work.

Never returned to work because the F.A.A. fired the petitioner during the 45-day entitlement period under the FECA, 5 U.S.C. 8118. Its obvious that the F.A.A. only charged the petitioner with being A.W.O.L. during the period when they and PATCO were involved in the strike, conditions beyond the petitioners control.

The F.A.A. need not prove its criminal charge prior to invoking the short-notice criminal procedure under 5 U.S.C. 7513(b)(1) (see, Knuckles v Bolger, (1981, CA8 Mo) 654 F2d 25., however, the use of this short-notice period is inappropriate where there is

no evidence in the record to show that a criminal procedure has been brought against the employee. See, Marsden v. United States Postal Service (1974, DC Minn) 390 F Supp 329.

In the case of Embrey v. Hampton, (CA4 Va) 470 F2d 146, a relevant part of that decision reads:

> The Department correctly waited until after conviction before bringing charges. Otherwise, Embrey might have claimed that the Department was violating the presumption that one is innocent until proved guilty.

Committing the fact-finding functions to an administrative agency does not in itself constitute a denial of due process of law, but, investing adjudicatory functions in an administrative agency, the constitutional right to a trial by jury may not be violated. See, Almon v. Morgan County, 16 So 2d 511.

This Court has said:

> An appellate federal court must satisfy not only itself of its own jurisdiction, but also of that of the lower courts in a case under review. See, Mitchell v Mauer, 1934, 55 S.Ct 162, 293 U.S. 237,244.

In 1970, this Court cleared up a good deal of confussion as to what constitutes a "criminal case" this Court said:

> That a jury trial must be provided when the penalty for the crime charged would be imprisonment for longer than six months. See, Baldwin v New York, 399 U.S. 66.

When this "criminal case" reached the Court of Appeals for the Federal Circuit it was given a civil form, because the only decision under review in this "criminal case" was that of an administrative agency. To give a civil form to a case which is essentially criminal violates all Constitutional guarantees. See, Burgess v Salmon, 97 U.S. 389 (1878).

The case of United States v Amato, 534 F Supp. 1190 (1982) clearly shows that the petitioner should have been given a judicial trial.

Rule 23(a) of the Federal Rules of Criminal Procedure provides:

> Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writting with the approval of the Court and the consent of the Government.

The record in this case contains no such waiver by the petitioner, nor consent of the court and the Government.

The jury trial clause was clearly intended to protect the accused from oppression by the Government. See, Singer v United States, 380 U.S. 24, 31 (1965).

The Court's have recognized that the right to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and (property) concept of the Fifth Amendment. See, United States v. Robel, 389 U.S. 258; Green v McElroy, 360 U.S. 474, 79 S Ct. 1400.

For the Government to take adverse action against the petitioner during a period covered by the provisions of the Federal Employees' Compensation Act, 5 U.S.C. 8101 et seq., and the special provisions contained under 20 C.F.R. 10.200 et seq., simply because of his membership in a labor organization is clearly an improper infringment on the right to free association guaranteed by

the First Amendment. See, American Federation of State, County, etc., v. Woodward (CA8 Neb) 406 F2d 137.

A complaint alleging that a former federal employee was discharged without cause, wrongfully, illegally, and maliciously has been held to state a cause of action and gives the Court of Claims jurisdiction to decide the case on the merits. See, Gadsen v. United States, 111 Ct Cl 478, 78 F Supp 126.

REASONS FOR GRANTING THE WRIT

The petitioner has pointed out that our system controlled by fallible men can err. Such errors have allowed the system to send an innocent citizen to his professional death without ever being inside of a court that has criminal jurisdiction, and a new way to circumvent the constitutional guarantees. This departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In common law countries there is no such

procedure as in some other nations, such as France, whereby a single proceeding can cover civil libility and criminal prosecutions merged into a single proceeding known as adhesion, which removes the necessity of two separate trials. However, in this country two separate actions must be brought, independent of each other. In American constitutional law, any legislative act that inflicts punishment on designated individuals without a judicial trial is a "bill of attainder" prohibited by Article I, section 9.

Those who wrote our Constitution well knew the danger inherent in special acts which take away the life, liberty, and property of particular named persons, because the government thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts. Thus, the case record clearly shows that one of the plainest Constitutional provisions was, therefore infringed. All persons accused of a

crime, are guaranteed the inestimable privilage of trial by jury.

Where the restriction of a Constitutional right is apparent this Court has been disposed to grant review and to place a strick burden on those seeking to justify the constitutional restriction. See, United States v. Lovett, 328 U.S. 303, 66 S Ct. 1073 (1946).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Donald Bodine
Pro Se
100 Washington Street
Apt., 3G
Hempstead, New York 11550
(516) 483-3346

MARCH 20, 1989

Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

United States Court of Appeals
for the Federal Circuit

88-1459

DONALD BODINE,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: December 19, 1988

Before FRIEDMAN, NIES and ARCHER, Circuit Judges.

PER. CURIAM.

The order of the United States Claims Court, 14 Cl. Ct. 661 (1988), dismissing appellant's complaint for lack of jurisdiction is affirmed.

Appellant's brief is largely an argument that his removal by the Federal Aviation Administration for having participated in the 1981 strike by the Professional Air Traffic Controllers Organization against the government, and the subsequent proceedings

contesting that removal before the Merit Systems Protection Board (MSPB), were "criminal in nature." This argument is totally without merit and forms no basis for reversing the dismissal order of the Claims Court. Moreover, the MSPB proceeding complained of resulted in a final decision in 1985 upholding appellant's removal, Bodine v. Department of Transp., F.A.A., No. NY075281 F082, 16 M.S.P.R. 711 (1985), which was affirmed on appeal to this court, Bodine v. Department of Transp., F.A.A. Appeal No. 85-1004, slip opinion (Fed. Cir. July 12, 1985) (unpublished). Appellant's other arguments were fully considered by the Claims Court, and we affirm on the basis of the decision of Judge Andewelt, filed April 27, 1988.

In the United States Claims Court

No. 417-87C

(Filed: April 27, 1988)

DONALD BODINE, Plaintiff, v. THE UNITED STATES, Defendant.	Civilian pay; challenge of termination of employment for participation in air traffic controllers' strike; lack of jurisdiction under Federal Employees' Compensation Act, OWCP Regulations, various Constitutional provisions, and the Back Pay Act; failure to pursue remedy under Civil Service Reform Act of 1978.

Donald Bodine, Hempstead, New York, pro se.

Hillary A. Stern, with whom were Assistant Attorney General John R. Bolton, David M. Cohen, Director, and Robert A. Reutershan, Assistant Director, Washington, D.C., for defendant. Joan Johnson, Federal Aviation Administration, of counsel.

ORDER

ANDEWELT, Judge.

In this civilian pay case, plaintiff, Donald Bodine, appearing pro se, seeks reinstatement and back as a result of the Federal Aviation Administration's (FAA) termination of

his employment as an air traffic controller. Plaintiff was removed from his position on August 25, 1981, for having participated in an illegal strike by the Professional Air Traffic Controllers Organization (PATCO) against the Government of the United States. Plaintiff alleges that the termination of his employment by the FAA and the upholding of that action by the Merit Systems Protection Board (MSPB) violated a series of statutory regulatory, and Constitutional provisions, including 5 U.S.C. 8101 et seq. (1982) (popularly known as the Federal Employees' Compensation Act (FECA).

The case is presently before the Court on defendant's motion to dismiss for lack of jurisdiction. For the reasons set forth herein, defendant's motion is granted and the complaint shall be dismissed.

Facts 1/

On July 15, 1981, plaintiff sustained an injury to his left shoulder while performing his duties as an air traffic controller.

He never returned to work. On July 18, 1981, pursuant to 5 U.S.C. 8118 (the "continuation of pay" provisions of FECA, discussed infra), plaintiff filed a Form CA-1, "Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay/Compensation," with the Office of Workers' Compensation Programs of the Department of Labor (OWCP). 2/ On or about July 23, 1981, pursuant to OWCP Regulation 10.203, 20 C.F.R. 10.203, the FAA controverted plaintiff's claim for continuation of pay by completing the indicated portion on the Form CA-1.

1/ For purposes of ruling on defendant's motion to dismiss, the facts alleged in the complaint are assumed to be true. In addition, the Court relies upon undisputed facts adduced from materials filed by the parties in connection with their briefs.

2/ The OWCP was established by the Assistant Secretary of Labor for Employment Standards, by the authority vested in him by the Secretary of Labor. See OWCP Regulation 1.1, (1981). In order to commence a continuation of pay claim, an injured employee must provide his or her official superior with notice of the injury on a Form CA-1 within two working days after the injury. See OWCP Regulation 10.209(a), 20 C.F.R. 10.209(a).

On August 3, 1981, PATCO went on strike. The FAA scheduled plaintiff to work during the strike, but he failed to report for duty. On August 13, 1981, the FAA sent plaintiff a letter notifying him of proposed action to remove him from his position for (1) unauthorized absence and (2) participation in a strike against the Government of the United States in violation of 5 U.S.C. 7311 and 18 U.S.C. 1918. Plaintiff was removed from his position on August 25, 1981, less than 45 days after he filed his claim for continuation of pay.

Plaintiff then challenged the actions of the FAA on two fronts, pursuing his claim for continuation of pay before the OWCP, and appealing the removal action to the MSPB. As to plaintiff's claim for continuation of pay, on September 30, 1981, the OWCP made the following determination:

> The facts of the injury and employment support the employee's contention that he/she was a Federal employee who sustained a traumatic disabling injury in the performance of duty. You should, therefore,

> continue his/her pay for the period of disability 7/16/81 through 7/22/81.

Contending that he was entitled to pay for periods beyond July 22, 1981, plaintiff sought review of the OWCP finding within the Department of Labor, but, at each stage, the original finding was upheld. Pursuant to the OWCP finding, the FAA continued plaintiff's pay only through July 22, 1981.

Plaintiff's appeal of the removal action to the MSPB was also unsuccessful. After conducting an evidentiary hearing, the MSPB upheld the removal action and found, inter alia, that plaintiff had participated in the PATCO strike in violation of the criminal statutes cited by the FAA in its notice of proposed removal action. Bodine v. Dep't of Transp., FAA, No. NY075281F082 slip op. (MSPB Dec. 3, 1982), appeal dismissed, 16 M.S.P.R. 711 (1985) (copy attached in Appendix). In its opinion, the MSPB stated:

> Despite a plethora of argument over the techical (sic) requirements for continuation of pay, including (plaintiff's) charges of conspiracy, perjury, and other alleged government procedural

> misconduct directed at him, what emerged from the evidence was not a scintilla of proof that (plaintiff) was, in fact, in any way or for any reason physically disabled on August 5, 1981.

Slip op. at 3.

Plaintiff did not appeal the MSPB's decision to the Court of Appeals for the Federal Circuit. Nearly four years after that decision, on July 13, 1987, plaintiff filed suit in this Court. In his complaint, plaintiff contends that his removal from the FAA and the MSPB's handling of his appeal involved violations of (1) the "continuation of pay" provisions of FECA, 5 U.S.C. 8118, and the related OWCP Regulations, 20 C.F.R. 10.200 et seq., (2) article III, section 2, clause 3, and the first and fifth amendments to the Constitution; and (3) the Back Pay Act, 5 U.S.C. 5596 (1982). 3./ Defendant moved to dismiss the complaint for lack of jurisdiction on September 11, 1987. 4/

3/ Plaintiff refers to the Back Pay Act in his prayer for relief.

Discussion

Plaintiff contends that his removal within 45 days of the filing of his claim for continuation of pay was inconsistent with the controlling provisions in FECA and, in addition, that the MSPB's review of his removal was flawed in numerous respects. 5/ For the reasons explained below, however, this Court does not have jurisdiction to entertain plaintiff's suit. Pursuant to the Civil Service Reform Act of 1978 (CSRA), Pub. L. 95-454, 92 Stat. 1111 et seq., (codified as amended in in various sections of 5 U.S.C. (1982 & Supp. IV), the proper forum for judicial review of the FAA's removal action and the MSPB's affirmance thereof is the Court of Appeals for the Federal Circuit.

In United States v. Fausto, 108 S. Ct. 668 (1988), the Supreme Court stated that,

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4/ After filing an opposition to defendant's motion, plaintiff moved for summary judgment. Proceedings with respect to plaintiff's summary judgment motion were suspended pending resolution of the jurisdictional sufficiency of the complaint.

when enacting the CSRA, Congress intended to provide "an integrated scheme of administrative and judicial review (of adverse personnel actions taken against federal employees), designed to balance the legitimate interest of various categories of federal employees with the needs of sound and efficient administration." Id. at 672. That intergrated scheme permitted plaintiff to contest his removal by the FAA before the MSPB pursuant to 5 U.S.C. 7702, which he did, and to appeal any adverse MSPB decision to the Court of Appeals for the Federal Circuit, which he failed to do. The CSRA gives the Federal Circuit exclusive jurisdiction in this regard and does not envision any review by the Claims Court. See 5 U.S.C. 7703(b)(1). 6/

5/ Plaintiff claims, inter alia, that the FAA did not produce sufficient evidence at the MSPB hearing to prove its charges against him; that the FAA officials who prepared the the agency's response controverting his FECA claim admitted at the hearing that they failed to follow the applicable OWCP regulations; that the MSPB lacked jurisdiction to rule on the criminal charges made by the FAA against the striking air traffic controllers; and that,

Plaintiff contends, however, that this action is not brought under the CSRA but, rather, is brought under the FECA, the related OWCP regulations, various provisions of the Constitution, and the Back Pay Act. Plaintiff contends, in effect, that notwithstanding Congress' enactment of the CSRA, these authorities provide this Court with jurisdiction under the Tucker Act, 28 U.S.C. 1491, to consider his claim. But examination of the authorties upon which plaintiff relies reveals that they do not confer jurisdiction upon this Court.

In United States v. Testan, 424 U.S. 392 392 (1976), the Supreme Court described the metes and bounds of the jurisdiction of this Court's predecessor, the Court of Claims,

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consequentely, the MSPB decision and the underlying FAA removal action are null and void and violative of his constitutional rights to be tried by a jury for alleged criminal conduct, to freedom of speech, and due process of law.

6/ 5 U.S.C. 7703, in pertinent part, provides:

7703. Judicial review of decisions the Merit Systems Protection Board.

* * * * * Footnote Continued

under the Tucker Act. 7/ The resultant principles are well settled. In this Court, as in any other court, the United States, as sovereign, is immune from suit except to the extent that it consents to be sued. Id. at 399. Such consents to suit, or waiver of sovereign immunity, "cannot be implied but must be unequivocally expressed." Id. (quoting United States v. Kink, 395 U.S. 1, 4 (1969)). A grant of a right to sue the Government for money damages must be made "with specificity"; the proper inquiry is whether the applicable Constitutional provision, statute, or regulation "can fairly be inter-

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6/ Footnote Continued

(b)(1) (A) petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provisions of law, any petition for review must be filed within 30 days after the date the petitioner received notice of the final order or decision of the Board.

7/ The Tucker Act, 28 U.S.C. 1491, confers jurisdiction upon this Court to render judgment upon any claim against the United States that is "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or

preted as mandating compensation by the Federal Government for damages sustained." Testan, 424 U.S. at 400 (quoting Eastport S.S. Corp. v. United States, 178 Ct. Cl. 599, 607, 372 F. 2d 1002, 1009 (1967)). The Tucker Act itself is not such a statute; it is only jurisdictional and, thus, "does not create any substantive right enforceable against the United States for money damages." Testan, 424 U.S. at 398.

When evaluated under the controlling Testan standards, none of the authorities cited in the complaint provide jurisdiction in this Court over plaintiff's claims. First, none of the Constitutional provisions in question--article III, section 2, clause 2 (entitling an individual accused of a crime to a trial by jury), the first amendment (providing for freedom of speech), and the due process clause of the fifth amendment--even mention, much less mandate, payment

7/ Footnote Continued

for liquidated or unliquidated damages in cases not sounding in tort."

of money by the Government. See Elkins v. United States, 229 Ct. Cl. 607, 608 (1981); Rosano v. United States, 9 Cl. Ct. 137, 142 (1985), aff'd, 800 F. 2d 1126, cert. denied, 107 S. Ct. 1350 (1987). See also Eastport Steamship, 178 Ct. Cl. at 605-07, 372 F. 2d at 1007. Next, as to the Back Pay Act, the Supreme Court held in Fausto that, after enactment of the CSRA, this Court did not have jurisdiction under the Back Pay Act to review an adverse agency personnel action that may give rise to a claim for back pay. 108 S. Ct. at 67677.

Finally, as to FECA and the related regulations, plaintiff would interpret these provisions as entitling an employee who has filed a work-related injury claim to a continuation of pay for a period of 45 days following the injury or, at a minimum, to work during that period. Plaintiff's proposed interpretation of the statute appears incorrect. 8/ But even if plaintiff's inter-

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8/ 5 U.S.C. 8118, in pertinent part, pro-

pretation were correct, FECA does not contain a waiver of sovereign immunity that would permit a suit against the Government for monetary damages in instances where the Secretary of Labor denied a continuation claim.

5 U.S.C. 8118 provides:

> "(t)he action of the Secretary or his designee in allowing or denying a payment under this subchapter is--
>
> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and
>
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

8/ Footnote Continued

vides:

> (a) The United States shall authorize the continuation of pay of an employee ... who has filed a claim for a period of wage loss due to a traumatic injury ....
>
> (b) Continuation of pay under this subchapter shall be furnished--
>
> (1) without a break in time unless controverted under the regulation of the Secretary;
>
> (2) for a period not to exceed 45 days
>
> * * * * *
>
> (d) if a claim under subchapter (a) is denied by the Secretary, payments under this section shall, at the option of the

Hence, rather than evincing an intention to permit lawsuits challenging adverse decisions of the Secretary of Labor on continuation of pay claims, FECA specifically precludes any such judicial review.

Conclusion

For the foregoing reasons, defendant's motion is granted and the Clerk of the Court shall dismiss the complaint. No purpose would be served by transferring plaintiff's complaint to the Federal Circuit, since the

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8/ Footnote Continued

employee, be charged to sick or annual leave....

Thus, contrary to plaintiff's suggestion, Section 8118(b)(2) does not guarantee continuation of pay for 45 days after the injury. Rather, in permitting the Secretary of Labor to authorize continuation of pay for "a period not to exceed 45 days," the statute merely creates an initial ceiling on continuation of pay, not a floor. Similarly, Section 8118(d) does not entitle an employee to use sick or annual leave in situations where payments are made and the Secretary of Labor subsequently denies the employee's claim for continuation of pay. See OWCP Regulation 10. 210(b), 20 C.F.R. 10.210(b). Here, no continuation payments were made for the period after July 22, 1981, and, hence, the authorization to use sick or annual leave in Section 8118(d) is inapplicable.

30-day statute of limitations within which an appeal of a MSPB decision must be filed expired long before the instant suit was filed. See 5 U.S.C. 7703(b)(1)

IT IS SO ORDERED

ROGER B. ANDEWELT
Judge

Note: This Order has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

United States Court of Appeals
for the Federal Circuit

88-1459

DONALD BODINE,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

Before FRIEDMAN, NIES and ARCHER, Circuit Judges.

ORDER

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and same hereby is, denied.

FOR THE COURT

January 25, 1989

Francis X Gindhart
Clerk

cc: Donald Bodine
Hillary A. Stern

FILED
U.S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
JAN 25 1989

COURT OF CLAIMS-JUDGMENTS FOR COMPENSATION

P.L. 92-415,

House Report (Judiciary Committee) No. 92-1023, Apr. 26, 1972 (To accompany H.R. 12392)

Senate Report (Judiciary Committee) No. 92-1006, Aug. 16, 1972 (To accompany H.R. 12392)

Cong. Record Vol. 118 (1972)

DATES OF CONSIDERATION AND PASSAGE

House May 1, 1972

Senate August 18, 1972

The Senate Report is set out.

SENATE REPORT NO. 92-1066

The Committee on the Judiciary, to which was referred the bill (H.R. 12392) to amend section 1491 of title 28, of the United States Code, to authorize the Court of Claims to implement its judgments for compensation, having considered the same, reports favorably thereon without amendment and recommends the bill do pass.

Purpose

The purpose of H.R. 12392, is to allow persons having monetary claims falling with-

in the jurisdiction of the Court of Claims to obtain all necessary relief in one action.

The bill does not extend the class of cases over which the Court of Claims has jurisdiction. The jurisdiction of the Court of Claims is currently limited by 28 U.S.C. 1491 to actions on monetary claims. The bill would provide an entire remedy which would complete the relief afforded by the judgment as an incident of and collateral to any judgment it may now render. It is further provided that in any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. Section 2 of the bill provides that the language added by the bill will be applicable to judicial proceedings pending on or instituted after the date of its enactment.

Statement

The Court of Claims currently has jurisdiction to render judgments upon claims against the United States founded either upon

the Constitution, Federal Statutes, regulations of executive departments, express or implied contracts with the United States, or claims for liquidated or unliquidated damages in cases not sounding in tort. The power of the Court of Claims has been limited in the past to rendering money judgments. The interpretation of section 1491, title 28, United States Code, has excluded any collateral remedy even though a number of classes of cases, composing a substantial portion of the Court of Claims docket, are subject to the need for collateral remedies in addition to a money judgment.

The Court of Claims in order to provide an entire remedy and complete the relief afforded by a judgment will be authorized to issue orders:

(1) Directing restoration to office or position;
(2) Placement in appropriate duty or retirement status; and
(3) For the correction of applicable records.

In addition, H.R. 12392 further vests in

in the Court of Claims the general power to remand appropriate matters to any administrative or executive body or official with such direction as is deemed proper and just.

The Administrative Office of the U.S. Courts advised that H.R. 12392 has the approval of the Judicial Conference of the United States primarily because it was identical to S. 1704 which was passed by the Senate in the 90th Congress. Hearings on the bill were held by the House Judiciary on March 1, 1972. During those hearings, the Department of Justice raised some objections fearing that the language of the bill would broaden the jurisdiction of the Court of Claims. Accordingly, an amendment was agreed upon during the House consideration of the bill and the Department of Justice accepts the final form of the bill. A review of the hearing record establishes the need for this remedial legislation.

The primary class of cases where a broader remedy is needed are suits filed on a money

claim by a Government employee who alleges that he was illegally discharged. At present, if the court finds that the employee was wrongfully discharged, it can award him back pay but it cannot order him reinstated to his former position. There are cases where administrative agencies refused to reinstate a wrongfully discharged employee, and it is therefore necessary for him to file an additional suit in a Federal district court to obtain reinstatement.

A second important classification where the present limits on the remedies available in the Court of Claims imposes unwarranted burdens on the litigant is in cases involving military personnel. These generally are monetary claims which are based on retirement pay or retirement in proper rank. Some of the cases are also based on an improper dismissal from the service. In those cases, the Court of Claims can grant a monetary judgment but cannot alter the serviceman's military status. This bill would permit the court to grant such military personnel relief collateral to and consistent with

the judgment.

The bill does not extend the class of cases over which the Court of Claims now has jurisdiction. As has been stated, when the Court of Claims does have jurisdiction over any cases before it, the bill will enable the Court of Claims to grant all necessary relief in one action. Accordingly, the provision of the bill which authorizes the Court of Claims to issue orders, as an incident of and collateral to its monetary judgment, directing placement in appropriate duty status is not intended to have any effect on the finality provision of 10 U.S.C. 876, which sets forth the conclusive nature of the proceedings, findings, and sentences of courts-martial.

Another significant class of cases illustrating a very cumbersome aspect of litigation in the Court of Claims is in suits arising under the "dispute" clause of Government contracts. This clause, which is required in all Government contracts, gives the Government contracting officer the right to render a decision on all disputes of fact.

His decision is final unless the contractor appeals to a Board of Contract Appeals.

The Supreme Court has held that in appeals from contract review board decisions, the Court of Claims is bound by the administrative record as to findings of fact unless arbitrary or not supported by substantial evidence. Morrison-Knudsen Company v. U.S., 170 Ct. Cl. 757, 345 F2d 833 (1965); U.S. v. Utah Construction & Mining Company, 384 U.S. 394 (1966); U.S. v. Anthony Grace & Sons, Inc., 384 U.S. 424 (1966); and U.S. v. Carlo Bianchi & Company, 373 U.S. 709 (1963).

Even in those contract cases in which the record is incomplete, the Court of Claims has held that it does not have the power to remand, but may only suspend proceedings pending further action by the administrative boards. But the administrative boards cannot be compeiled to review or reconsider cases which have been suspended by the Court of Claims. Anthoney Grace & Sons, Inc v. U.S., (170Ct. Cl. 688,694) 345 F2d 808, 812 (1965). Those contract cases which have been

suspended by the Court of Claims pending further action by the administrative boards in some instances have been suspended for excessively long periods of time and some cases have never been fully resolved. These unnecessary delays are undesirable as they preclude the Court of Claims from granting a speedy review of appeals in contract cases. The enactment of H.R. 12393 would enable the Court of Claims to exercise a remand power in such cases which would thereby provide the court with a necessary useful tool for effective judicial administration. It is the opinion of this committee that H.R. 12392 provide a sound means for expediting litigation brought before the Court of Claims. It will relieve litigants from unwarranted inconvenience and expense and relieve the court system from a proliferation of suits by permitting complete relief in a single action.

It is the conclusion of the committee that enactment of this bill would improve

the administration of justice in the Court of Claims by simplifying the procedure and reducing the costs incurred in litigation and in the pursuit of administrative remedies. It is recommended that the bill be considered favorably.

Correspondence

The approval of the Administrative Office of the U.S. Courts the Office of the Attorney General of the United States, and Wilson Cowen, Chief Judge of the U.S. Court of Claims is evidenced by correspondence included in the House report which is a follows:

Administrative Office of the U.S. Courts,
Washington, D.C., February
7, 1972.

CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this 3rd day of April, 1989, I caused to be placed in the United States Mail (first-class, postage prepaid) two (2) copies of "PETITION FOR WRIT OF CERTIORARI" addressed as follows:

Solicitor General,
Department of Justice,
Washington, D.C. 20530